United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4186

To be argued by Jeffrey H. Swartzbaugh
Time requested for argument, 10 minutes

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-4186

KNUT H. FRIESS,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF OF PETITIONER, KNUT H. FRIESS

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P/S

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STATEMENT OF THE CASE

This is an appeal by petitioner, Knut H. Friess, from an order of Hon. Henry J. Millman, Immigration Judge, dated September 26, 1975. The order denied petitioner's renewal at a deportation hearing held January 21, 1975, of an application for adjustment of status to that of a permanent resident under Section 245 of the Immigration and Nationality Act. Petitioner seeks review of said order as well as the dismissal of his appeal by the Board of Immigration Appeals dated May 7, 1976.

STATEMENT OF THE FACTS

Petitioner, a native of Germany, entered the United States in December of 1973 from Canada. His purpose was to join the Zen Center of Rochester, New York to complete training in the teachings of Zen Buddhism begun at an affiliate Zen Center in Toronto, Canada during September of 1972. The Zen Center in Rochester is a non-profit religious corporation devoted to the teachings and practices of Zen Buddhism and is functionally comparable to a school of divinity.

The ultimate objective of a member of the Center is to become a Buddhist monk or teacher. A typical day at the Center involves periods of meditation, chanting services, meals and chores. Members are rotated with respect to the performance of various functions, e.g., scheduling workshops, organizing

religious retreats, supervising meditations, practicing chants and maintaining the physical structure of the Center itself.

Members accepted for training at the Center receive room and board as well as fifty ($50.00) dollars per month for personal needs since they are unable to maintain themselves by means of employment. The normal twelve to fourteen hour day spent in training at the Center allows for little in the way of outside activity.

Petitioner has been engaged in training at the Center since his arrival here and continues to be at the present time. His activities and life style are consonant with the regimen of the Center as detailed. The sincerity of his beliefs and his stated desire to see through his training to completion cannot seriously be doubted when measured against his activities of the past nearly three years.

ARGUMENT
POINT I

The Immigration Judge and Board of Immigration Appeals erred as a matter of law in requiring a Labor Certification on behalf of Petitioner.

Section 212(a)(14) of the Immigration and Nationality Act provides that aliens who seek entry to the United States to provide skilled or unskilled labor are excludable unless the Secretary of Labor certifies that there are not sufficient workers who are able, willing, qualified and available to perform such labor and that wages and working conditions of

workers in the United States similarly employed will not be adversely affected by the employment of such aliens. 8 U.S.C. § 1182(a)(14)(1970), amending 8 U.S.C. § 1182(a)(14)1964). An alien is exempt from this certification with respect to an application for permanent resident status if he establishes that he will not perform skilled or unskilled labor. 8 C.F.R. § 212.8(b).

Petitioner contends that he in fact performs neither skilled nor unskilled labor. Each and every activity engaged in by him at the Center is considered to be a valid educational and religious experience of necessary value to the training of the members according to the Buddhist understanding.

Petitioner contends as well that the only logical interpretation of whether he is exempt from certification is whether he performs skilled or unskilled labor in competition with the labor force. To view it otherwise would be ludicrous, i.e., an individual performing rudimentary household chores, but otherwise unemployed, would be viewed as needing a labor certification to the extent that these tasks could be performed by skilled artisans; electricians, etc. There is no question petitioner does not compete with the labor force in any activity in which he engages at the Center.

Petitioner also contends that, at best, the statute is applicable only to those whose primary purpose is the performance of labor. Gordon and Rosenfield "Immigration Law and Procedure" (1971) § 240 at 2-195. This conclusion is based upon the legislative history of the 1965 amendments to the Immigration and

Nationality Act mandating the labor certification requirements for those aliens who seek to enter the United States to perform labor. The Senate Report provides as follows:

> The provision is applicable to immigrants from the Western Hemisphere, other than immediate relatives, non-preference immigrants, and those preference immigrants who seek entrance into the United States for the primary purpose of gainful employment, whether in a semi-skilled or skilled category or as a member of the profession, arts or sciences ... . (Emphasis added) S. Rep. 748 (p.15) 89th Congress, 1st Sess.

The legislative history of this section was interpreted in Matter of Hoeft, 12 IN 182 (1967), a case involving a 32 year old divorcee with three children who entered the United States as a visitor and thereafter attempted to adjust her status. Despite the fact that the alien received support from her husband, she worked two or three days a week (four hours a day) ironing for people who brought clothing to her home. Hoeft, at 183. Counsel for the alien, utilizing the 'primary purpose' argument, contended that the alien was exempt from the labor certification requirements. The Immigration Service, upon the original appeal to the Board, did not dispute this argument but nevertheless the Board required a labor certification because in their view the alien's primary purpose in entering was to take full-time employment.

Upon a motion to reopen, counsel for the alien again raised the 'primary purpose' argument contending that the alien never worked full time and that her primary purpose to be in the

United States was to be with her family. Id. at 184. The Service then took the position that the 'primary purpose' test was not controlling, but rather, the test was whether "it is the purpose of the alien to perform any labor in the United States, whether full or part time, primary or incidental, which may impinge, however remotely, on workers already in the United States ...." Id.

The Board, in interpreting the above-quoted Senate Report, stated as follows:

> The reference, in the cited report, to an entry for the primary purpose of employment does not attempt to state a test for determining whether the three classes of immigrants must obtain a labor certification; it is merely descriptive of one of the three classes. This can be seen from the mere fact that the words do not even refer to two of the three classes of aliens mentioned in the cited report: The words do not apply to the immigrants from the Western Hemisphere, or to the immigrant who has a preference only by reason of relationship. In referring to the third group, the words describe not the purpose of the workers in entering, but the kind of immigrant who is given a preference primarily because his services are needed (Sections 203(a)(3) and (6) of the Act.) Id. at 185.

Petitioner submits that this interpretation of Congressional history by the Board is incorrect factually and as a matter of law. The logical and reasonable interpretation of the language of the report is that the labor certification requirement is applicable to all immigrants, Western Hemisphere, non-preference and preference immigrants who seek to enter the United States for the primary purpose of gainful employment, but that said

requirement would not be applicable to immediate relatives.

In the instant case, petitioner's sole purpose in coming to this country and his sole purpose in wishing to adjust his status is a religious one. It is certainly not his 'primary purpose' in coming to perform labor and a labor certification should not be required.

The Board, in eliminating the 'primary purpose' test in Hoeft, stated as follows:

> The test, drawn from a careful consideration of the statute, the Congressional history, and the regulations, is that the immigrant's purpose in coming, will not immediately require employment. The purpose will not require competition with the American labor market. The nature of migration will not necessitate competition in the labor market. Id.

Even if the Board's views as expressed in the Hoeft case are correct, they are all the more reason that a certification should not be required.

Petitioner does not compete with the labor market. Those activities performed as a part of the Center's program are a religious and educational experience and can in no sense be viewed as coming within the traditional definition of work or employment, as we know it, regardless of whether respondent and other members of the religious program are provided with substinance allowances. Judge Millman apparently agrees since one of his bases for deeming the certification necessary was that petitioner, "as an employable person, may decide to enter the labor market at any time in the reasonably foreseeable future". Dec. of Judge Millman at p. 3. (Emphasis).

POINT II

The Immigration Judge erred in equating Petitioner's position with that of a student requiring labor certification.

Apparently the administrative view is that, because of the elimination of the exemption from certification requirements for certain students, students in certain courses of study are potentially employable and must obtain labor certifications. Gordon and Rosenfield, Supra, Supp. at 122. Even if one concedes that such a view is correct, it is incorrect to equate petitioner with such students. Petitioner is not enrolled in a full-time course of study in an accredited school. He is not learning a trade or profession which will enable him to compete with United States citizen skilled workers or professionals. Petitioner is learning and living a religious way of life. There is no basis for doubting the sincerity of his purpose in this regard.

The elimination of the blanket exemption for full-time students "means that a student will need a labor certification if it is reasonably anticipated that he will enter the labor market". Gordon and Rosenfield, Supra. Thus, for example, a student pursuing a full-time course of study to become an electrical engineer might reasonably be anticipated to be a future threat to the United States labor market. However, petitioner is practicing and learning the Buddhist teachings and there is no conceivable reason to conclude that he will ever, upon completion of his training, engage in secular activities which might constitute such a threat.

Petitioner has come to the United States for the sole purpose of devoting himself exclusively to the practice of the Buddhist teachings. He has never sought outside employment and has no intention whatsoever of doing so, having no interest therein. Petitioner is not a threat, present or future, to the United States labor market.

The Board's reliance on Matter of Redekop-Rempening, 11 I & N Dec. 674 (BIA 1966) is misplaced. Redekop holds exactly the opposite of that position which the Board cites it as authority for.

POINT III

If Petitioner is required to obtain a labor certification he is entitled to precertification.

Regulations promulgated by the Secretary of Manpower provide for precertification for persons involved in specified religious activities coming to the United States to engage in such activities. 29 C.F.R. 60.2(a)(1), 60.7, Schedule A, Group III(a),(b) and (c). Apparently the Board's view is that because no provisions are made for precertification of trainees for such occupations, petitioner, as a trainee, requires a certification. That conclusion is incorrect as a matter of law. Precertification is nothing more than a labor market determination made a substantial length of time in advance which identifies occupations in such short supply as to require no further finding of fact.

The fact that trainees are not mentioned in the regulations does not reasonably lead to the conclusion that an

individual labor certification is necessary in this case. The type of religious activity described in the regulations is precertified for the reason that it presents no threat to the United States Labor Force. Is it then reasonable to conclude that the training for these types of activities can be considered to be such a threat? That conclusion is arbitrary and unreasonable.

POINT IV

The facts and circumstances of this case warrant the favorable discretion of the Attorney General in consideration of Petitioner's application for permanent resident status.

The Immigration Judge ruled that as a matter of discretion the privilege of adjustment of status should not be afforded petitioner based upon that fact that he seeks to extend his stay in this country on a permanent basis for the purpose for which he was admitted temporarily. It is submitted that this ruling was arbitrary and capricious and an abuse of discretion.

There are no set guidelines in connection with the Attorney General's exercise of discretion in permitting adjustment of status. The exercise of such discretion was discussed in Matter of Arai, 13 IN 494 (1970), which involved the denial of adjustment apparently because the alien had accepted employment before his trainee status was acted upon. The alien's appeal was sustained by the Board which states 'In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion.' Arai, at 496.

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IMMIGRATION AND NATURALIZATION SERVICE,

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Docket No. 76-4186

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

MICHAEL S. GELACAK, being duly sworn, deposes and says that he is over 18 years of age, not a party to the action, and that he served the Brief of appellant, KNUT H. FRIESS, and the Appendix of appellant, KNUT H. FRIESS, on the respondent-appellee, IMMIGRATION AND NATURALIZATION SERVICE, in the following manner:

By personally delivering to and leaving true copies thereof with James W. Grable, Trial Attorney for the Immigration and Naturalization Service, on the 14th day of September, 1976 at the United States Court House, Buffalo, New York; that he knew the person so served to be authorized to accept service on behalf of the respondent-appellee named therein.

Michael S. Gelacak

MICHAEL S. GELACAK

Sworn to before me this
14th day of September, 1976.

Stephen R. Lamantia

STEPHEN R. LAMANTIA
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1977

MSG/tc

XXXXXXXXXXXXXXXXX IN THE UNITED STATES COURT OF APPEALS

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AFFIDAVIT OF SERVICE

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OFFICE, POST OFFICE ADDRESS AND TELEPHONE

816 PRUDENTIAL BUILDING

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(716) 856-1192

TO:

PLEASE TAKE NOTICE that an *, of which the within is a co*

was duly granted in the within action on the *day of* *, 19* *, and duly entered in the office of the Clerk of*

County of *on the* *day of* *, 19*

Yours, etc.,

LAMANTIA & GELACAK

ATTORNEYS FOR

DUE AND PERSONAL SERVICE of the within paper(s) and of the Notice hereon endorsed is admitted this *day of* *, 19*

Attorney(s) for

STATE OF NEW YORK
COUNTY OF } ss.:

OF

, being duly sworn, deposes and says: that deponent is not a party to this action and is over

years of age, that on the *day of* *, 19* *, deponent served the within*

paper(s)

in this action, at the above address(es) designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postp
properly addressed wrapper, in a official depository under the exclusive care and custody of the United States post office department within
State of New York.

Sworn to before me, this *day of* *, 19* .

My commission expires

Notary Public, Erie County, N.Y.; Commissioner of Deeds, Buffalo, N.Y.

The confusion on the part of the petitioner and the Zen Center as to the exact non-immigrant or immigrant status to which he was entitled should not be considered an 'adverse factor'. Like the alien in Arai, petitioner entered the United States legally, and is 'a young man, in good health and of good moral character'. Ibid, at 495.

The Board in Arai, provides further, "where adverse factors are present in a given application, it may be necessary for the applicant to offset these by a showing of unusual or even outstanding equities". Ibid at 496. Assuming that the above-mentioned confusion did amount to an 'adverse factor', his presence here as a member of the Zen Center should be considered as an equity in his favor.

CONCLUSION

For all the reasons set forth above, petitioner's application for permanent resident status should be granted.

Respectfully submitted,

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JHS/tc